In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1605

FRED B. BLACK, JR., PETITIONER

v.

SHERATON CORPORATION OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This suit was brought against the United States, the Sheraton Corporation of America, and the Washington Sheraton Corporation seeking damages for trespass and invasion of privacy allegedly resulting from eavesdropping upon petitioner at the Sheraton Carlton Hotel in Washington, D. C.

The sole issue before this Court is whether the court of appeals erred in dismissing, as improvidently granted, an interlocutory appeal from a decision of the district court holding that the United States, in

pretrial discovery, properly invoked the privilege protecting the identity of confidential informants as a ground for declining to give testimony or to produce documents relative to the identity of, the role played by, or the circumstances surrounding the use of confidential informers.[1]

1. As a part of his pretrial discovery, petitioner took the deposition of the FBI agent in charge of the criminal investigation of petitioner. The agent answered all questions except those which would have tended to identify a confidential informer who assisted the agent in his investigation of petitioner. Petitioner moved to compel answers to the questions and, later, for production of certain documents pertaining to the informer.

After an oral hearing on the motions, the district court ordered the United States to produce, for *in camera* inspection, all documents which identified the informer, pertained to his role, or summarized meetings or communications with him (Pet. App. A.25-A.26). Petitioner moved to modify the order to provide for an evidentiary hearing before the *in camera* inspection (Pet. App. A.26-A.27). This motion was denied. (Pet. App. A.27)

The court, upon examining the documents, ruled that the informer's privilege was applicable. Balancing the competing interests of the petitioner and the

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[1] The Solicitor General advised this Court, in May 1966, that eavesdropping had occurred in connection with a criminal trial of the petitioner. *Black* v. *United States*, 385 U.S. 26. The Court reversed petitioner's conviction and remanded for a new trial, at which he was acquitted (Pet. 5, n. 2).

United States in disclosure of the informer's identity under *Roviaro* v. *United States*, 353 U.S. 53, it concluded that the United States had properly invoked the privilege here (Pet. App. A.2-A.27).

2. The district court certified its decision on the informer's privilege issue (but not its decision regarding *in camera* inspection) for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. A.28-A.29). The court of appeals initially accepted the appeal (Pet. App. A.29). After oral argument, however, the court dismissed the appeal as improvidently granted (Pet. App. A.1). At argument, the court questioned whether petitioner had exhausted his remedies in the district court because he had not sought the identity of the informer from the Sheraton defendants. Subsequent to the dismissal, petitioner filed interrogatories upon the Sheraton defendants seeking to ascertain the identity of the informer (Pet. App. A.31-A.34). The court of appeals extended petitioner's time to seek rehearing before it until 10 days after the interrogatories had been answered (Pet. App. A.29-A.30). After answers to the interrogatories had been filed by the Sheraton defendants,[2] disclaiming knowledge of the eavesdropping (Pet. App. A.34-A.41), petitioner moved for a rehearing. The motion was denied (Pet. App. A.43).

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[2] The district court denied the United States' motion to quash the interrogatories propounded to the Sheraton defendants, partially on the ground that the informer was immune from civil liability. The district court refused to certify this order for interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals denied the United States' Petition for Writ of Prohibition or Mandamus.

3. In the judgment which is before this Court, the court of appeals simply declined to exercise its discretion under 28 U.S.C. 1292(b) to entertain an appeal from an interlocutory order of the district court. The merits of the district court's decision which, in any event, rested largely on the particular facts of this case, may thus be reviewed by the court of appeals at a later time. The issues raised by petitioner do not, therefore, warrant review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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